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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

MIKE AHMADSHAHI et al., Plaintiffs and Appellants, v. FIRE INSURANCE EXCHANGE, Defendant and Respondent.	B216385 (Los Angeles County Super. Ct. No. BC385998)

APPEAL from a judgment of the Superior Court of Los Angeles County. John Shook, Judge. Affirmed.

The Marks Law Firm, Scott A. Marks for Plaintiffs and Appellants.

Stone & Hiles, David L. Schaffer for Defendant and Respondent.

This is an insurance coverage dispute. The insured home was damaged by a water leak. The insurance policy excludes damage from water that "seeps, leaks, [or] drips," unless the water discharge is "sudden and accidental." The trial court granted summary judgment in favor of the insurer. After de novo review, we conclude that there is no evidence of a "sudden" discharge of water, a covered peril. We affirm the judgment.

FACTS

The Insurance Policy

Appellants Mike and Katayoun Ahmadshahi owned a home on Marmol Drive in Woodland Hills (the Property). The Property was insured under a homeowners' policy (the Policy) issued by respondent Fire Insurance Exchange (the Insurer). The Policy was in effect from March 2006 until July 2007.

The Policy excludes coverage for losses caused directly or indirectly by "water damage." In an endorsement, the phrase "water damage" is defined as "**water** which seeps, leaks, drips, escapes or is released out of any plumbing, heating or air conditioning system, or from within a household appliance, other than a sudden and accidental release of **water**."

The Damage to the Property

On March 18, 2007, Mr. Ahmadshahi saw a "water leak" at the Property. At the time, the Property was vacant: appellants relocated to Calabasas in 2006, and intended to put the Property up for sale in April 2007. Mr. Ahmadshahi went to the Property regularly, and did not notice any water during a visit 10 or 11 days earlier.

Mr. Ahmadshahi called Mike Diamond Plumbing Company. Alfredo Abelyan (the Plumber) was dispatched to investigate and remedy the leak. When the Plumber arrived, he observed in the downstairs bedroom area that "[m]ost of the drywall was falling down already from the ceiling and the insulation was fell down [*sic*], and that . . . the floor was soaking in the water, wet." He could see water "trickling down" a copper pipe that passed up through the "two-by-fours" towards the kitchen. He stated that it "was not dripping. It was leaking. I could see the water slowly coming down." He

estimated that the stream of water was enough to fill a five-gallon bucket in two to three hours.

The Plumber went upstairs to the kitchen to find the source of the water. According to the statement of undisputed facts, the Plumber determined that "water had been leaking out of the connection between the pipe and the shut-off valve for a refrigerator ice-maker in the kitchen." Per Mr. Ahmadshahi, the Plumber said that a hose coming from the refrigerator "burst" and that "it was so tiny, very, very tiny, that [ ] it was going on for [a] long time. I don't know what the long time meant. He said for [*sic*] while that, uh, the water was just accumulating in the ceiling . . . and all of a sudden it came down." The Plumber cut the pipe, then installed a new adapter and shut-off valve.

During his deposition, the Plumber stated that the water "first start[ed] dripping, and then slowly, slowly, drips turn into a leak." The Plumber threw away the pipe that failed, and did not closely examine it to determine whether poor soldering caused the leak.[1] He was more interested in fixing the problem than knowing what caused it.

On his invoice for appellants, the Plumber wrote that a "pipe burst." At his deposition, the Plumber explained that when a pipe starts to leak, it bursts under the water pressure in a house. In his mind, the event at appellants' house started off as a slow leak that got worse over time. He uses the word "burst" to describe every leak he ever looks at where water is coming out of a pipe. In his words, it is not "an explosion of water."

Appellants hired a construction expert to assess the cause of their damage. The expert reviewed the Plumber's deposition and photographs of the damage to the Property. He opined that the loss stemmed from a sudden and accidental release of water from a pipe located behind the refrigerator wall, occurring within two to four days before

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[1] The trial court sustained appellants' objections regarding the possibility of a bad soldering job; however, the court overruled their objections to the Plumber's testimony that the pipe "slowly started leaking, and then kept getting more and more and more." Appellants do not challenge this ruling on appeal.

appellants discovered the damage.[2] The expert arrived at this conclusion because: the Plumber testified that there was a lot of water, and the floor and carpet were wet; the Plumber indicated that there was leaking from the pipe, not just dripping; the Property had high water pressure; the damage included crumbling drywall, bubbling paint, mold and water-soaked surfaces; and Mr. Ahmadshahi described the release of water as a "strong spray."

Appellants hired an expert in environmental testing who conducts microbial investigations. In March 2007, shortly after appellants' claim was denied, the microbial expert visually examined the Property and collected mold samples. He found mold contamination in the downstairs rooms and in the drywall near the broken water pipe. He opined that the pipe broke—and caused black mold to appear—between two and four days before it was discovered by appellants.

The Insurer's Investigation

On March 19, 2007, appellants made a claim for damages to the Insurer. The claim was assigned to Guillermo Navarro. On March 26, Navarro inspected the Property, took photographs, and conducted a taped interview with appellants. Navarro observed crumbling drywall, bubbling paint, rot on a door frame and trim, and thick mold.

While at appellants' home, Navarro telephoned Mike Diamond Plumbing and spoke to the office manager. Appellants were in the kitchen with Navarro when the call was made; however, Mr. Ahmadshahi claims that Navarro "wanted to imitate that he's trying to call [Mike] Diamond," adding, "But it was clear to me that he did not call."[3] According to Navarro, the manager told him that the Plumber replaced a refrigerator shut-off valve that failed due to age.

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[2] The trial court sustained the Insurer's objection to the expert's opinion because (1) it lacked foundation and (2) the expert lacks a plumbing license and was unqualified to render an opinion about plumbing failure.

[3] Navarro submitted his cellular telephone records, showing a six-minute call to Mike Diamond's toll-free number. The number Navarro called is printed on the invoice the Plumber gave to appellants.

Amir Naftali is the manager at Mike Diamond Plumbing. Naftali could not recall whether he spoke to Guillermo Navarro in March of 2007. Naftali indicated that he would normally get homeowner approval before speaking to an insurance adjustor, and he would have documented the call. He did not find any documentation of a call from Navarro. Although Navarro testified that it is "a good practice" to talk to the person who repaired the leak, Navarro never spoke to the Plumber before he denied appellants' claim.

Navarro testified that the rate at which the water escapes from the pipe determines whether there is coverage under the Policy. The Policy covers "sudden and accidental" releases of water. If the water comes from repeated leakage, seepage or dripping, it is not covered by the Policy. When Mr. Ahmadshahi told Navarro in a taped statement that it was a "tiny" leak going on for a "long time," it meant that this was not a sudden event covered under the Policy. Based on the nature of the damages (i.e., rot and thick mold), Navarro could tell that the event had been going on for a long time.

On March 27, 2007, Navarro denied appellants' insurance claim. He wrote, "My investigation revealed that your shut off valve failed due to wear and tear resulting in a continuous seeping, dripping or leaking of water that has been occurring over some period of time." Navarro also wrote that the rot and mold damage are not covered by the Policy. Navarro invited appellants to provide additional information supporting a potential for coverage. Navarro did not hear from appellants after sending the denial letter.

Appellants' Lawsuit

Appellants filed suit against the Insurer for breach of contract and breach of the implied covenant of good faith and fair dealing. Appellants allege that their insurance claim is covered by the Policy because "it was due to the sudden and accidental discharge of water from a plumbing system." The Insurer allegedly breached the contract by denying appellants' claim. In addition, appellants allege that the Insurer acted in bad faith by failing to conduct a fair investigation of the claim; by disregarding the Plumber's opinion; by misrepresenting the Policy provisions; and by refusing to pay a covered loss.

The Insurer sought summary judgment, arguing that appellants' damage was caused by a leak, an excluded peril. The trial court initially granted the Insurer's motion on March 11, 2009. However, appellants sought relief on the grounds that their attorney inadvertently failed to establish a sufficient foundation showing the qualifications of their construction expert. The court agreed to revisit its ruling in light of a new declaration submitted by appellants' expert.

After reconsideration, on May 11, 2009, the trial court found that the Insurer is entitled to judgment as a matter of law. The Insurer demonstrated that the water damage was the result of water that dripped and then leaked out of a pipe for a refrigerator ice-maker: damage caused by water that drips and leaks out of a plumbing system is excluded from coverage. The court wrote that neither appellants' construction expert nor their microbial expert "possesses the necessary qualifications to give opinion testimony on whether the water which escaped from plaintiffs' pipe qualifies as a sudden and accidental release." The court concluded that appellants did not offer sufficient evidence to raise a triable issue of fact as to whether the discharge was sudden and accidental. The court entered judgment for the Insurer. The appeal is timely.

DISCUSSION

1. Appeal and Review

The judgment for the Insurer is final and appealable. (Code Civ. Proc., § 437c, subd. (m)(1).) A motion for summary judgment "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (*Id.*, subd. (c).) "The purpose of the law of summary judgment is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) Review of the ruling on summary judgment is de novo. (*Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1003.)

In an "all risk" homeowner's policy, the insurer must prove the policy's noncoverage of the insured's loss. (*Strubble v. United Services Auto. Assn.* (1973) 35

Cal.App.3d 498, 504-505.) On a motion for summary judgment, the insurer must show that the insured cannot establish that the claim falls within the "sudden and accidental" exception. (*Travelers Casualty & Surety Co. v. Superior Court* (1998) 63 Cal.App.4th 1440, 1456.) To make this showing, the insurer may point to evidence that undermines that insured's theory of liability. (*Ibid.*)

2. Interpretation of Insurance Contracts

"[I]nterpretation of an insurance policy is a question of law." (*Waller v. Truck Ins. Exchange, Inc*. (1995) 11 Cal.4th 1, 18.) We "look first to the language of the contract in order to ascertain its plain meaning or the meaning a layperson would ordinarily attach to it." (*Ibid*.) The "clear and explicit" meaning of policy terms, interpreted in their "ordinary and popular sense" guides our reading of the policy. (*Ibid.*; Civ. Code, §§ 1638, 1644.) Ambiguities in the policy are resolved in favor of coverage. (*AIU Ins. Co. v. Superior Court* (1990) 51 Cal.3d 807, 822; *Montrose Chemical Corp. v. Admiral Ins. Co.* (1995) 10 Cal.4th 645, 667.)

3. Breach of Contract Claim

The Policy excludes coverage for water that "seeps, leaks, drips, escapes or is released." Coverage is afforded only if there is a "sudden and accidental discharge" of water from a plumbing system. Appellants contend that there is a triable issue as to whether the water discharge in this instance was "sudden and accidental."

The word "sudden" used in the phrase "sudden and accidental" "has a temporal element and does not mean a gradual or continuous discharge." (*Standun, Inc. v. Fireman's Fund Ins. Co.* (1998) 62 Cal.App.4th 882, 889.) The word "sudden" "*must*, if it is to be anything more than a hiccup in front of the word 'accidental,' convey a 'temporal' meaning of immediacy, quickness, or abruptness." (*ACL Technologies, Inc. v. Northbrook Property & Casualty Ins. Co.* (1993) 17 Cal.App.4th 1773, 1786.) "[W]hatever 'sudden' means, it does not mean gradual. The ordinary person would never think that something which happened gradually also happened suddenly. The words are antonyms." (*Id.* at p. 1788.) "'Accidental' means an unexpected or unintended *discharge*, not unexpected or unintended *damage*." (*Standun, Inc. v. Fireman's Fund Ins.*

Co., supra, 62 Cal.App.4th at p. 889; *State of California v. Allstate Ins. Co.* (2009) 45 Cal.4th 1008, 1020.)

The Insurer carried its burden of showing the damage resulted from an excluded peril (i.e., water that seeps, leaks, drips, escapes or is released) and that the water discharge was not "sudden." In his recorded statement, Mr. Ahmadshahi stated that the leak was "tiny, very, very tiny [and] it was going on for [a] long time." The Plumber testified that water "first start[ed] dripping, and then slowly, slowly, drips turn into a leak." He also testified that he "could see the water slowly coming down" or "trickling down" a copper pipe. He clarified that there was not an "explosion" of water.

In sum, the Insurer's evidence shows that the leak was gradual: there was a water discharge that (1) began as a drip, and (2) "slowly, slowly" became a leak, that (3) was "very tiny," and (4) went on "for a long time," and (5) the Plumber saw water trickling slowly down a pipe. This was not an immediate, quick or abrupt discharge of water. Thus, the Insurer showed that the damage arose from water that seeps, leaks, drips, escapes or is released—damage excluded from coverage—and that the water discharge was gradual, not "sudden."

The trial court found that appellants' construction expert was not qualified to opine that the water discharge was sudden and accidental, or that his opinion lacked a factual foundation. Appellants do not argue that the trial court's evidentiary ruling constitutes reversible error. Even if we were to assume that appellants' experts are qualified, their opinions do not create a triable issue of fact. The critical point is that appellants, in their opposition to the motion for summary judgment, did not refute their Plumber's statements that the leak was "tiny," started as a "dripping" and "slowly, slowly" became a leak. "Drips" and "leaks" are excluded perils. A layman reading the Policy would understand that it covers sudden outflows of water, such as when a dishwasher hose breaks in mid-cycle, or a water heater gives out and floods a room, or a toilet overflows. (See, e.g., *De Bruyn v. Superior Court* (2008) 158 Cal.App.4th 1213 [overflowing toilet is sudden and accidental].) Incremental leaks that gradually worsen over time are not covered.

4. Bad Faith Claim

Appellants contend that the Insurer's "dishonest and fraudulent conduct breached the implied covenant of good faith and fair dealing." A cause of action for breach of the implied covenant cannot be maintained unless policy benefits are due. If there is no coverage under the terms of the policy, there is no basis for a claim that the insured's right to receive the benefits of the contract were frustrated by an inadequate investigation, oppressive conduct by a claims adjuster, or other underhanded tactics. (*Waller v. Truck Ins. Exchange, Inc.*, *supra*, 11 Cal.4th at pp. 35-36.) Absent a contractual right to coverage, "the implied covenant has nothing upon which to act as a supplement and 'should not be endowed with an existence independent of its contractual underpinnings.'" (*Id*. at p. 36.) In light of our decision that appellants failed to establish their right to benefits under the policy, a bad faith cause of action cannot be maintained.

DISPOSITION

The judgment is affirmed.

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BOREN, P.J.

We concur:

DOI TODD, J.

CHAVEZ, J.